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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 168

GUY CARLETON DENNEY, *Petitioner,*

vs.

THE FORT RECOVERY BANKING COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

O. J. Myers
B. A. MYERS,
Attorney-at-Law,
Celina, Ohio,
Counsel for Respondent.

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STATUTES CITED

Section 203, Title 11 of U.S.C.A., as amended, etc. 2

Section 75 of the Bankruptcy Act:

11 U.S.C.A. 203, 75(s) (3), (Sec. 75, subs. a-s).....5, 11

11 U.S.C.A., Sec. 203, subs. a-s12, 17

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BRIEF OF RESPONDENT.

I.

Contested Issues.

After litigation, The Ft. Recovery Banking Company, a secured creditor, and party to the bankruptcy proceedings, withdrew all motions and pleadings to dismiss the

farmer-debtor's amended petition, and by agreement of the parties, the farmer-debtor was adjudged a bankrupt, and the case was referred by the District Judge to the Conciliation Commissioner, Byron G. Jenkins, for further proceedings under the provisions of Section 203, Title 11 of U.S.C.A., as amended, etc. (R. 7, date June 20th, 1940.)

On September 4th, 1940, the Conciliation Commissioner, after a hearing, and after an appraisalment of the property, entered an order of rental and stay of proceedings (R. 9).

The Docket of the Conciliation Commissioner shows no petition for review or appeal. (See affidavit of Byron G. Jenkins, filed October 6th, 1942 (R. 25). Also, affidavit of Byron G. Jenkins, filed December 24th, 1942 (R. 54). Byron G. Jenkins is now Circuit Judge of Jay County, Indiana.

Attorneys Samuel E. Cook, and Malcolm V. Skinner, represented the farmer-debtor. After Attorney Cook had mailed to the Conciliation Commissioner a petition for review, Attorney Skinner had a conference with the Conciliation Commissioner and withdrew the petition for review. At the hearing before the District Judge on February 17th, 1942, Attorney Cook was present, and stated to the District Judge that there was no petition for review filed. (See opinion of Judge Slick in case: *In Re: Denney*, 47 Fed. Sup., November 30th, 1942, page 38). Attorney Cook at that time had in his possession all of the correspondence which is referred to in the affidavit of Denney filed November 24th, 1942 (R. 44).

The main issue in this case involved the proceedings and facts above referred to. Respondent claims that they are immaterial and of no force and effect, relying upon

the consent order entered by the District Judge on February 17th, 1942, at a hearing attended by the farmer-debtor, and his attorney, Cook. (See Consent Order, R. 8.) (See also reference thereto pages 13 and 14 of the Record, pleading filed by Elmer McClain, wherein the circumstances of the hearing on February 17th, 1942, are set out.)

Attorney Cook having withdrawn from the case, and Attorney McClain having entered the case, McClain in this cause attempts to have set aside and declared null and of no force or effect the consent order made and entered into by Attorney Cook and the farmer-debtor himself on February 17th, 1942.

The petition of the Respondent, The Ft. Recovery Banking Company, which it had filed on September 18th, 1941, was assigned for hearing on February 17th, 1942. (See Clerk's Docket Entries, R. 64, under date September 18th, 1941.)

On February 17th, 1942, the date of the hearing as assigned, the farmer-debtor, through his attorney, Cook, filed a cross-petition for re-appraisement. The hearing was had on February 17th, 1942, before the District Court and this entry was made on the docket by the Court (R. 64):

"1942

Feb. 17 Debtor files cross petition for reappraisement. Hearing on petition to liquidate. By agreement debtor permitted to redeem property for \$8680.00 within 6 months from date and waives right to re-appraisement."

The facts are that the farmer-debtor made no effort whatever to comply with this order, but had moved off of

the farm and accepted a position in a defense factory at Indianapolis, Indiana, the farmer-debtor being a graduate engineer.

The six months to redeem having expired on August 17th, 1942, The Ft. Recovery Banking Company, on September 18th, 1942, filed its petition for a trustee and for an order of sale to liquidate the real estate (R. 65).

Upon this issue, and the facts, Respondent claims under the law that it was entitled to an order of sale and the appointment of a trustee.

II.

Issues or Claims of Respondent.

(1)

That there was no petition for review or appeal filed by the farmer-debtor from the order of the Conciliation Commissioner fixing the appraisal and terms of stay.

(2)

That if a petition for review was filed the same was waived by the consent order made and entered in open court before the District Judge on February 17th, 1942.

(3)

That the consent order made and entered on February 17th, 1942 was valid and binding upon the farmer debtor.

(4)

That the issues and questions raised by Counsel for the Petitioner involve disputed facts and that the special finding of facts made by the District Judge are not subject to review under the facts and circumstances presented, there was substantial evidence to support the District Judge in his findings.

III.

Statement of the Case and Subject Matter.

The issues involved in this cause were originally tried before the Hon. Thomas W. Slick, Judge of the United States, for the Northern District of Indiana, Ft. Wayne Division. The questions presented arise out of the redemption provisions of the Farmer-Debtor law, Section 75 of the Bankruptcy Act, 11 U.S.C.A. 203.

The particular statute involved is Section 75(s) (3).

The District Court made special findings of fact in rendering his decision, which were filed and are a part of the record (R. 26).

These findings of fact were not attacked by Counsel for either party and stand as the facts in this case.

"SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Court having read the verified application for stay filed by the farmer-debtor, and considered the other verified and unverified pleadings in the matter, now finds and states as special findings of fact as follows, to-wit:

I.

Petitioner, Guy Carleton Denney is a farmer-debtor and the Fort Recovery Banking Company of Fort Recovery, Ohio, is a secured creditor. Proceedings were had under Section 75 of the Bankruptcy Act that finally resulted, on September 4, 1940, in the Conciliation Commissioner making an order pursuant to the orders of this Court, which order provided for a stay of proceedings in the State Court, fixing certain rentals to be paid by the farmer-debtor, part of which antedated the issuance and entry of the order of this Court to the Conciliation Commissioner.

II.

The order of the Conciliation Commissioner requiring the farmer-debtor to pay as rentals for the farm of which the Farmer-Debtor retained possession for the year 1941 and 1942 the sum of \$420.00 per annum; that no receiver should be appointed; and that all rentals of said land were to be paid to the Commissioner; that all proceedings in the State Courts were to be stayed during the period of redemption as fixed by the Bankruptcy Act and that the debtor should remain in possession of the land during said period of redemption under the supervision of the Court.

III.

The farmer-debtor felt aggrieved with the decision of the Conciliation Commissioner and instructed his counsel to prepare and file the necessary papers to obtain a review of said order, said order being made on September 4, 1940.

IV.

The instructions of the farmer-debtor to his counsel to obtain a review of said order were not followed. However, his counsel did prepare a petition for a review and an assignment of errors and mailed the same to the farmer-debtor who failed and neglected to file the same with the Conciliation Commissioner.

V.

Afterwards, to-wit, on June 17, 1942, the Court pursuant to the consent of the farmer-debtor, made in open court, entered the following order, to-wit:

'At South Bend, Indiana, in said District on the 17th day of February, 1942, (his cause having been duly assigned for hearing on the petition of The Ft. Recovery Banking Company of Ft. Recovery, Ohio, to liquidate the real estate of the bankrupt, described in his petition herein, and on the cross-petition of the debtor or bankrupt for re-appraisement, notice having been given, and said bankrupt having appeared in person and

by his attorney, and The Ft. Recovery Banking Company of Ft. Recovery, Ohio, having appeared personally through its officers and agents, and its attorney, said parties in open court agreed as follows:

That said bankrupt waive his right of re-appraisement, and that said debtor or bankrupt be permitted to redeem said property as described in his petition for eight thousand six hundred and eighty dollars (\$8680.00), to be paid into Court on or before August 17, 1942. On default thereof, said land to be sold.

Both parties interested having agreed in open Court as above set out, the Court approves and confirms said agreement, the same to be made a part of the record of this proceedings. Both parties waive all right of proceedings in appeal or error.

Dated June 17, 1942.

Approved: Thos. W. Slick, Judge of the
United States for the Northern
District of Indiana, Fort Wayne
Division.

O.K. Attorney for Bankrupt,
O.K. B. A. Myers,
Attorney for the Ft. Recovery
Banking Co., Ft. Recovery, Ohio.'

VI.

At no time since the beginning of these proceedings has the farmer-debtor paid any rent or interest or anything on the principal of the debt of the Ft. Recovery Banking Company.

Thos. W. Slick
Judge, U. S. District Court."

Special finding of fact marked III was later supplemented by the District Court upon the receipt of additional information showing that no appeal was filed from the

order of the Referee fixing the rentals. (Affidavit of Byron G. Jenkins, Referee, R. page 54. Also, Supplemental Opinion of the District Court, R. page 55):

“SUPPLEMENTAL OPINION

Since filing the opinion overruling the Farmer-Debtor's Supplemental Petition for Re-hearing, the affidavit of Honorable Byron G. Jenkins, former Conciliation Commissioner, has been called to my attention.

The affidavit shows clearly what happened. Malcolm V. Skinner, one of the attorneys for the Farmer-Debtor, withdrew the petition for appeal mailed to the Conciliation Commissioner by his co-counsel, Hon. Samuel E. Cook. This showing entirely exonerates former Conciliation Commissioner Jenkins and explains why the appeal was not followed up, and serves to emphasize what I said in the original opinion overruling the supplemental petition for re-hearing concerning the very unsatisfactory way these proceedings were conducted and only fortifies me in my former opinion overruling the supplemental petition for re-hearing.

It now appears that no appeal was taken and that the order of the Conciliation Commissioner stands unappealed from.

Thos. W. Slick (Signed)
Judge, U. S. District Court

Dated: December 26, 1942.
Hammond, Indiana.”

An order was made on September 4th, 1940, fixing the rentals to be paid by the Farmer-Debtor, which order was made by the Referee. (Copy of order, See R. 9 and 10.)

The Farmer-Debtor paid no rental and made no effort to comply with the order of the Referee, and on September 18th, 1941, The Ft. Recovery Banking Company, Respond-

ent, filed a petition for the sale of the real estate and the appointment of a trustee. (See Clerk's Docket Entries, R. 64.) This petition was assigned for hearing by the District Court on February 17th, 1942, and an agreement or consent order was made by the Farmer-Debtor and his Attorney, with the Respondent and its Attorney. (See Clerk's Docket Entries, R. 64.) This entry was put in writing and approved by the Court on June 17th, 1942. (Clerk's Docket Entries, R. 64.)

The entry was as follows:

"And Afterwards, to wit: On the 17th day of June, 1942, the Court entered an order in the above entitled cause, and said order reads in the words and figures following, to wit:

At South Bend, Indiana, in said District, on the 17th day of February, 1942, this cause having been duly assigned for hearing on the petition of the Ft. Recovery Banking Company of Ft. Recovery, Ohio, to liquidate the real estate of the Bankrupt, described in his petition herein, and on the cross-petition of the debtor or Bankrupt for re-appraisalment, notice having been given, and said Bankrupt having appeared in person and by his Attorney, and The Ft. Recovery Banking Company, of Ft. Recovery, Ohio, having appeared personally through its officers and agents, and its attorney, said parties in open Court agreed as follows:

That said Bankrupt waive his right of re-appraisalment, and that said debtor or Bankrupt be permitted to redeem said property as described in his petition for eight thousand, six hundred and eighty dollars (\$8680.00), to be paid into Court on or before August 17th, 1942. On default thereof, said land to be sold.

Both parties interested having agreed in open Court as above set out, the Court approves and confirms said

agreement, the same to be made a part of the record of this proceedings. Both parties waive all right of proceedings in appeal or error.

Dated June 17th, 1942.

Approved: Thos. W. Slick,
Judge, District Court of the
United States for the Northern
District of Indiana, Ft. Wayne
Division.

O.K.

Attorney for Bankrupt

O.K. B. A. Meyers (signed)

Attorney for the Ft. Recovery
Banking Company, Ft. Recovery, Ohio."

And, afterwards, to wit, on the 11th day of August, 1942, Attorneys Malcolm Skinner and Samuel E. Cook, apparently withdrew from the case and Attorney McClain, on behalf of the debtor, filed an application for a three year stay, and for opportunity to redeem.

Afterwards, to wit, on the 18th day of September, 1942, more than ninety (90) days after the filing of the entry on June 17th, 1942, the Respondent filed an application for the appointment of a Trustee and for an order of sale of the real estate of the Farmer-Debtor (R. 15). This application was filed because the Farmer-Debtor had wholly failed to comply with the consent order entered on February 17th, 1942, in open Court and before the District Judge, and because neither one of these orders had been appealed from.

These matters were submitted to the District Court, the Farmer-Debtor being present in person and by his Attorney, McClain, and Respondent being present by its officers and its Attorney, B. A. Myers, and afterwards,

to-wit, on the 7th day of October, 1942, the District Court entered its special findings of fact and conclusion of law and opinion. (R. pages 26, 27, 28, 29, 30, 31 and 32).

Afterwards, to wit, on the 21st day of November, 1942, the District Court entered an order appointing Fred B. Dressel, Trustee to sell said real estate (R. 36).

Afterwards, to wit, on the 17th day of December, 1942, the Farmer-Debtor filed his Notice of Appeal (R. 47.)

The Circuit Court of Appeals, Seventh Circuit, heard this case and decided it, affirming the District Court, on April 19th, 1943. Reported in 135 (2d) Federal Reporter, 184.

IV.

Law Laid Down by Circuit Court of Appeals.

The Circuit Court in its decision defined the law as follows:

"1. Courts

An appeal does not lie from order denying a petition for rehearing and a supplement thereto.

2. Bankruptcy

A farmer-debtor is free to accept any procedure other than that laid down in the Bankruptcy Act, and thus waive a procedure which he may otherwise insist upon. Bankr. Act, Sec. 75, subs. a-s, 11 U.S.C.A. Sec. 203, subs. a-s.

3. Bankruptcy

Where farmer-debtor in open court personally and by counsel agreed to order providing that he should have right to redeem land at its agreed value on or before a certain date, in default of which land was to be sold, he thereby "waived" his right to redeem with-

in three-year statutory period of redemption. Bankr. Act, Sec. 75, sub. s, 11 U.S.C.A. Sec. 203, sub. s.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Bankruptcy

Farmer-debtor who accepted part of order setting aside exemption could not insist upon consideration of his petition to review the whole order which sought to fix the value of the realty. Bankr. Act, Sec. 75, sub. s, 11 U.S.C.A. Sec. 203, sub. s.

5. Appeal and error

One cannot appeal from an order or judgment under which he has accepted a benefit.

6. Bankruptcy

An order requiring farmer-debtor to pay rent which remained unreviewed and unchallenged could not be impeached when creditor sought an order for sale of the land and appointment of a trustee therefor. Bankr. Act, Sec. 75, subs. a-s, 11 U.S.C.A. Sec. 203, subs. a-s.

7. Bankruptcy.

Where farmer-debtor for more than two years failed and refused to comply with court's order to pay rent, court was justified in ordering a sale of the land and appointing a trustee therefor. Bankr. Act, Sec. 75, subs. a-s, 11 U.S.C.A. Sec. 203, subs. a-s."

As attorney for the Respondent, we have attempted to make reference to the facts of this case as determined by the District Judge. We have also made reference to the findings of the law by the Circuit Court of Appeals.

We have done this because Attorney for the Farmer-Debtor in the Record and in his brief, attempts to cloud the real facts and issues, of the case, and attempts, as we believe, to substitute his facts and conclusions, disputing the real issues presented to the District Court and the Circuit Court of Appeals.

V.

ARGUMENT AND LAW.

Counsel for respondent, after studying this case, has concluded that the opinion of Minton, Circuit Judge of the Court of Appeals, fully covers all the essential facts and legal questions involved in this case, and respectfully submit the same to this Court as for argument and law, quoting:

“MINTON, Circuit Judge.

The appellant on March 31, 1937 filed a petition for a composition with his creditors or for an extension of his debts under Section 75, subs. a to r of the Bankruptcy Act, 11 U.S.C.A. Section 203, subs. a to r. The proceeding failed, and the appellant on June 5, 1937 filed an amended petition under Section 75, sub. s of the Bankruptcy Act, 11 U.S.C.A. Section 203, sub. s, praying to be adjudged a bankrupt. By an agreed order made on June 20, 1940, the petitioner was adjudicated a bankrupt. The case was referred to a conciliation commissioner, and the court ordered that the property be appraised and that the commissioner require the bankrupt to pay rent, as required by statute. The appraisal of the property was filed July 6, 1940, appraising it at \$7,000. Thereafter, on September 4, 1940, after a hearing, the commissioner fixed a schedule of rents to be paid by the appellant ordered that his exemption be set off to him, and ordered a stay of other proceedings.

The appellant was represented by Malcolm V. Skinner of Portland, Indiana, and Samuel E. Cook of Huntington, Indiana. Mr. Cook prepared and mailed to the commissioner a petition to review the rent order made by the commissioner. His associate, Mr. Skinner, withdrew the petition, and it was never considered by the court. Therefore, the order of September 4, 1940 stood.

The appellant paid no rent, interest or taxes, nor did he make any payments on the principal. He remained in possession, and was in possession on February 17, 1942. The appellee held a mortgage on the appellant's farm and had filed a petition to liquidate the real estate. This petition came on for hearing on February 17, 1942. The appellant was present in person, and by his counsel, Mr. Cook. The appellee was present by its officers and by its attorney. The parties then and there agreed in open court to the following order, which was filed of record June 17, 1942, to-wit:

'At South Bend, Indiana, in said District, on the 17th day of February, 1942, this cause having been duly assigned for hearing on the petition of The Ft. Recovery Banking Company of Ft. Recovery, Ohio, to liquidate the real estate of the Bankrupt, described in his petition herein, and on the cross-petition of the debtor or Bankrupt for re-appraisement, notice having been given, and said Bankrupt having appeared in person and by his Attorney, and The Ft. Recovery Banking Company, of Ft. Recovery, Ohio, having appeared personally through its officers and agents, and its attorney, said parties in open Court agreed as follows:

'That said Bankrupt waive his right of re-appraisement, and that said debtor or Bankrupt be permitted to redeem said property as described in his petition for eight thousand, six hundred and eighty dollars (\$8680.00), to be paid into Court on or before August 17th, 1942. On default hereof, said land to be sold.

'Both parties interested having agreed in open Court as above set out, the Court approves and confirms said agreement, the same to be made a part of the record of this proceedings. Both parties waive all right of proceedings in appeal or error.'

The appellant still continued in possession of the real estate. Just how long he remained in possession does not appear, although it does appear that the appellant left the real estate and moved to Indian-

apolis. He was by profession an engineer, and he accepted a position as an engineer in a defense plant in that city. The real estate, however, remained in his possession through his tenants.

Since the appellant failed to redeem the property by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor. No payment of rent, interest, taxes, or any part of the principal had been made by the appellant.

On November 21, 1942, after a hearing, the court sustained the petition of the appellee, entered an order of sale, and appointed a trustee. The appellant filed a petition and supplement to the petition for rehearing, both of which were overruled. The appellant appeals from the order of the court of November 21, 1942, and the order denying the petition and supplement to the petition for rehearing.

(1) Obviously, an appeal does not lie from the petition for rehearing and the supplement thereto. *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381; *Roe-mer v. Bernheim*, 132 U. S. 103, 10 S. Ct. 12, 33 L. Ed. 277; *First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co.*, 8 Cir., 98 F. 2d 416.

The appellant contends it was error for the court to order the sale of the property pursuant to the consent decree entered June 17, 1942, as the statutory three-year period for redemption had not expired, that the procedure laid down in the statute must be followed and the appellant could not waive this procedure.

(2) With this contention we are unable to agree. The statute has prescribed a certain procedure that must be followed if the farmer-debtor insists upon it. It is not for the courts to point out or explore any short cuts. The court cannot *force* the farmer-debtor to accept any procedure except that laid down in the statute. That is not to say that the farmer-debtor may not come into open court with his attorney and

understandingly and voluntarily agree to another procedure. He may deem it to his advantage to accept another procedure. This he is free to do, unless the farmer-debtor is to be considered a ward of the court, which view we do not accept. This being so, the appellant may waive a procedure which he may otherwise insist upon.

The appellant relies upon *John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176, and *Borchard v. California Bank*, 310 U. S. 311, 60 S. Ct. 957, 84 L. Ed. 1222. In both of these cases, there was an effort to compel the farmer-debtor to accept a procedure other than that provided by statute. In neither case did he consent in open court under the advice of counsel to an order, as the appellant did in the case at bar on February 17, 1942. In the *Borchard* case, *supra*, there was some stipulations and consent orders made as the proceedings went along, dealing with the disposition and use to be made of funds, derived from the crops, but the final step that led to the court's order for liquidation of the property was not consented to by the farmer-debtor, and the stipulations were no part of that proceeding.

(3) We think the appellant voluntarily, knowingly and advisedly consented to a procedure different from that laid down in the statute, and his conduct in this regard amounted to a waiver of his right to thereafter insist upon the letter of the statute.

(4, 5) The appellant insists that his petition mailed to the commissioner to review the order of September 4, 1940 fixing the rent to be paid, setting off to him his exemption, and staying any other proceedings, must be certified to the judge for decision. If the appellant had not by his attorney withdrawn the petition, and the District Court found from evidence in the record that he had, there might be some merit in this contention. The appellant did another thing with reference to the order he would review. He sought to review the whole order of September 4, 1940, and his

counsel admitted that the bankrupt had received, accepted and kept the exemption that was set off to him under one of the provisions of that order. He cannot accept part of the order and insist upon consideration of his petition to review the whole order. One cannot appeal from an order or judgment under which he has accepted a benefit. *Chase v. Driver*, 8 Cir., 92 F. 780; *Albright v. Oyster*, 8 Cir., 60 F. 644; *Kaiser v. Standard Oil Co.*, 5 Cir., 89 F. 2d 58; *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127.

(6) Since the order of September 4, 1940 remained unreviewed and unchallenged, there was an order by the commissioner that the appellant pay rent, which order provided the amount to be paid and when it was to be paid. Since this order was not reviewed, its validity cannot now be impeached. From September 4, 1940, when this order was entered, to this day, the appellant has not obeyed the order of the court to pay rent. The statute, section 75, sub. s (3) of the Bankruptcy Act, 11 U.S.C.A., Section 203, sub. s (3), provides:

‘If, however, the debtor at any time fails to comply * * * with any orders of the court made pursuant to this section * * * the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.’

(7) Because the appellant for more than two years after the order to pay rent was made, failed and refused to comply with the court’s order that he pay rent, the court was justified under the provisions of the statute just quoted in ordering a sale of the land and the appointment of a trustee therefor.”

This is a direct quotation of Judge Minton’s decision, 135 Federal Reporter, 2d Series, 184.

VI.

CONCLUSION.

As the U. S. Circuit Court of Appeals, in its opinion above has carefully analyzed the U. S. Supreme Court decisions cited by Counsel for Petitioner, definitely showing that they have no application to the issues involved in this case, we feel that it is unnecessary for us to make further comment, as the Court is familiar with those cases.

Respectfully submitted,

B. A. MYERS,

*Counsel for the Respondent,
The Ft. Recovery Banking
Company.*